IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

CRIMINAL APPEAL NO. 615 OF 2003.

Pintukumar @ Jitendrakumar
Chedilal Girigosavi ..Appellant.

vs.

The State of Maharashtra. ..Respondent.

Shri Arfan Sait Advocate (Appointed) for the Appelant.

Shri A.S. Shitole, A.P.P. for the State.

CORAM: V.M.KANADE,J.
DATED:10 -1-2005.

ORAL JUDGMENT:

1. The appellant is challenging the judgment and order passed by the 2nd Ad hoc Assistant Sessions Judge, Palghar, in Sessions Case No.120 of 2000. By the said judgment and order dated 12th July 2001, the trial Court convicted the appellant- original accused for the offences punishable under sections 363, 366 and 376 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 1 year, 2 years and 7 years respectively. The trial Court also imposed a fine of Rs.. 500/- upon the appellant on each count.

2. The prosecution case is that the accused used to collect scrap and sell it to scrap dealers. The prosecutrix Annu was residing at Virar and used to sell vegetable in the Virar market. The prosecution

case is that accused came in contact with the prosecutrix and fell in love with her. The accused took the prosecutrix to Ahmedabad where he resided with her in a room which he had taken on rent and both of them lived at Ahmedabad as husband and wife. The accused also had taken her to a temple and tied Mangalsutra and thereafter had taken her to his mother. The accused was working in a chemical factory . It is alleged that the accused had sexual intercourse with the prosecutrix as a result of which she became pregnant.

3. The mother of the prosecutrix lodged a complaint on 25.3.2003 and enquiry was made on the basis of the investigation which was carried out by the investigating officer which revealed that the accused was staying with the prosecutrix at his native place at Itawa. Some persons along with Head Constable Lokhande were deputed for bringing back the prosecutrix and the accused. The accused was arrested. Both were medically examined by the doctor and after investigation was completed, a charge sheet was filed against the accused and charge was framed under sections 376, 363 and 366 of the Indian Penal Code. Accused pleaded not guilty to the said charge.

4. The trial Court after appreciating the evidence adduced by the prosecution convicted the

appellant-accused and sentenced him to suffer Rigorous Imprisonment for 7 years.

5. Shri Arfan Sait, learned Counsel appearing on behalf the appellant submitted that the prosecution has not proved that the prosecutrix was a minor below the age of 18 years. He submitted that there was no evidence to indicate that the prosecutrix was minor as no ossification test was performed and neither the birth certificate from the municipal record was produced nor original school leaving certificate was produced by the prosecution. He further submitted that the mother of the prosecutrix has nowhere stated in her evidence that her daughter was a minor. He submitted that thus prosecution has miserably failed to establish that the prosecutrix was below 18 years of age. He further submitted that from the evidence on record and the statement of the prosecutrix and also the other circumstances which were on record the only inference which could be drawn was that the prosecutix lived with the accused with her own consent and had stayed with the accused as his wife. He submitted that there was no element of any threat given to the prosecutrix which was evident from her statement. Shri Sait further submitted that the prosecutrix having accompanied the accused and having stayed with him for about 4 to 5 months with her own consent, no offences under sections 376, 363 and 366

of the Indian Penal Code were made out from the facts and circumstances of the case.

6. Shri Adsule,learned A.P.P. for the State vehemently opposed the said submissions made by the learned Counsel appearing for the accused. He submitted that the trial Court had given cogent reasons while coming to the conclusion that accused had committed the said offences. He submitted that there is no reason to interfere with the said order passed by the trial Court. He therefore, submits that the appeal is liable to be dismissed.

7. In order to establish that accused had committed offences under sections 363, 376 and 366 of the I.P.C., the prosecution has first to establish that the prosecutrix was a minor girl below 18 years of age and secondly, prosecution has to establish that the accused had forcibly and against will of the prosecutrix had kidnapped her and had sexual intercourse without her consent.

8. The first question, therefore, which falls for consideration is whether the prosecution has proved that the prosecutrix was below 18 years of age. The prosecution examined P.W. 1- Sharda Jaiswal, mother of the prosecutrix. She has stated in her evidence that her daughter was studying in Dayanand Saraswati

School and had left further education and that on 13th March 2000 her daughter did not return home and, therefore, she searched for her daughter in the market and on the railway station, but she was not found. According to this witness, she lodged a report with the police station at Virar that her daughter was missing. She has stated that the accused was found moving in their vicinity and he was doing scrap business. She therefore, made enquiry with the brother of the accused who informed her that accused had also not returned to the house. P.W.1, therefore, filed a complaint on 25.3.2000 and after about 4 months police brought her daughter back from Itawa. P.W.1 in her entire evidence has not stated the age of the prosecutrix. She has not mentioned her date of birth. She has not produced birth certificate of her daughter. In fact, there is no mention of the birth date of the prosecutrix. The prosecution further examined the prosecutrix- Annu as P.W.2. Her statement was not recorded on oath. She also has not stated her age in her evidence. She has stated that accused asked her to accompany him and therefore she had gone with the accused to Ahmedabad. There both of them stayed together and accused had sexual intercourse with her. The accused had taken her to a temple and tied mangalsutra around her neck. In her entire evidence she has not stated her age. She has not stated that accused had forcibly committed rape on

her. In the cross-examination, she has admitted that when accused carried her in a rickshaw she did not raise any hue and cry. She has further admitted that at Ahmedabad she stayed with the accused in a rented premises and when accused used to go on duty, she used to stay alone in the house and there was no pressure of any person on her. Thus, evidence of this witness also does not support the prosecution case that the prosecutrix was a minor. The prosecution has, thereafter, examined Dr. Pundalik Sonawane as P.W.4. This witness also has not stated the age of the prosecutrix. He had not performed ossification test which could have indicated the age of the prosecutrix. He has stated that the prosecutrix was pregnant by about 6 weeks and that there was no injury on her person or on her private part. In my opinion, it was the duty of the prosecution first to establish that the prosecutrix was a minor and surprisingly, the prosecution has not produced medical evidence on record to establish this fact. The prosecution has further examined P.W.7- Bhanu Pratap Singh, who was working as a Clerk in the school in which prosecutrix had taken her education. He has stated that certificate was issued by the Headmaster and trustee of the school in which date of birth of the prosecutrix has not been shown. In the certificate it is mentioned that school record was washed out in heavy rains and stormy winds and records were damaged.

Therefore, there was no clear proof relating to age of the prosecutrix. Thus, prosecution has failed to produce school register or certificate of the Headmaster to establish that the prosecutrix was minor. The prosecution has also examined Trustee of the school - Rajanarayana Sankata Pathak- P.W.9, who has produced certificate at Ex. 36 in which date of birth of the prosecutrix is mentioned as 7.10.1984. He has, however, candidly stated that certain record was damaged due to heavy rains and the school premises were not in a proper condition. He has further stated in his evidence that certificate was prepared by one of the clerks in the school. He has stated that the Police Station, Virar, had made a demand that they required a certificate that the prosecutrix was a student of their school and that according to the school record her date of birth is 7.10.1984. It is difficult to rely on the said certificate as P.W.9 has admitted that some record of the school was damaged and the premises were in not in proper condition and it was damaged in the heavy rains in the preceding years. He has stated in the examination-in-chief that the said certifctae was issued on the demand made by Virar Police Station. This admission has practically demolished the prosecution case. It is evident that this certificate has been issued without verifying the record, as the record has been admittedly damaged and destroyed. Thus, from the evidence brought on record

the prosecution has miserably failed to establish that the prosecutrix was a minor girl below 18 years of age. Thus, offence under section 363 of the I.P.C. has not been established.

9. The second question which falls for consideration before this Court is whether prosecution has proved that the prosecutrix was kidnapped against her will and accused had sexual intercourse without her consent. From the evidence of the prosecutrix it cannot be said that the accused had forcibly taken her without her consent or had sexual intercourse without her consent. The prosecutrix stayed with the accused at Ahmedabad for 4 to 5 months. She did not raise any hue and cry when she was allegedly kidnapped from Virar. She has stated that when accused used to go to attend his work she used to be alone in the house. At that time, she did not raise any hue and cry. She has admitted that accused had sexual intercourse with her as a result of which she has become pregnant. The prosecutrix thus, obviously, had gone on her own will to stay with the accused at Ahmedabad. She has stated that the accused used to treat her as his wife and he had also taken her to a temple where he tied mangalsutra around her neck . He had also taken her to his mother at his native place at Itawa. Thus, prosecution has failed to establish that the accused has committed offences under sections 363, 366 and 376

of the Indian Penal Code.

10. The trial Court, in my view, has erred in holding that the prosecution has proved that accused has committed offences under sections 363, 366 and 376 of the I.P.C. The judgment and order of the trial Court is, therefore, quashed and set aside and appeal is allowed. Accused is directed to be released forthwith unless he is otherwise required in any other case.